BUSINESS & LABOR
EXHIBIT NO. 5
DATE 2-3-09
BILL NO. SB 142

MONTANA STATE AUDITOR

MONICA J. LINDEEN
STATE AUDITOR

COMMISSIONER OF INSURANCE
COMMISSIONER OF SECURITIES

February 3, 2009

VIA HAND DELIVERY
Senator Carolyn Squires, Member
Montana Senate Business, Labor
and Economic Affairs Committee
Montana State Capitol
P.O. Box 200500
Helena, Montana 59620-200500

RE: Senate Bill 142

Dear Senator Squires:

This letter responds to your question(s) during the Senate Business, Labor and Economic Affairs Committee hearing on SB 142, authored by Senator Gary Perry. The bill seeks to repeal Montana's so-called "unisex" insurance law codified at § 49-2-309, MCA. Specifically, the bill strikes the word "sex" in § 49-2-309(1), MCA.

You and the other members of the Committee raised a variety of important questions about this legislation. Those questions ranged from why Montana was "the only state" to disallow gender rating in insurance (a position advanced by the proponents of the legislation), to the constitutionality of the practice.

Interestingly, the same day of the hearing on SB 142, the City and County of San Francisco filed suit against the California State Insurance Commissioner and others, alleging that provisions of California law allowing differential pricing of health insurance on the basis of the insured's sex are unconstitutional. California does not have a "unisex" requirement similar to that in Montana. Our office has obtained a copy of the Complaint for Declaratory and Injunctive Relief, which we are attaching to this letter.

The California lawsuit is interesting in several respects. First, the Complaint alleges that "many states – including New York, Massachusetts, and Oregon – bar health insurance companies from engaging in gender rating." Compl., ¶ 3. A Los Angeles Times news story concerning the litigation places the number of states barring the practice at ten. See attached. Montana is not alone in banning the practice, as was suggested by the proponents of SB 142 during the hearing.

The California litigation also is noteworthy given the equal protection allegations raised in the pleadings. You will recall that during the hearing, State Auditor Monica Lindeen

spoke in opposition to the bill, noting her concern that allowing gender rating would potentially violate the 1972 Montana Constitution. Ann Brodsky, Esq., Chief Legal Counsel for Governor Schweitzer, echoed those constitutional concerns.

Jacqueline Lenmark, Esq., representing the insurance industry, responded to the constitutional concerns orally and, following the hearing, provided a "brief" on the issue to the Committee members. The brief is really three documents: Ms. Lenmark's testimony from 1999 to the House Business and Labor Committee ("Lenmark Testimony"); a 1984 memorandum to various attorneys/lobbyists for the insurance industry prepared by Donald Garrity, Esq. ("Garrity Memorandum"); and a 1984 legal memorandum from Greg Petesch ("Petesch Memorandum"), then a staff attorney for the Montana Legislative Council. The newest of the three aforementioned documents, Ms. Lenmark's testimony, is ten years-old. The legal analyses are both twenty-five years old.

Regrettably, time, the press of other agency business and our desire to provide you a response as quickly as possible, do not permit a comprehensive constitutional analysis of Ms. Lenmark's materials or an in-depth nationwide review of the practice of gender rating. Nor does this correspondence represent a final, definitive statement of the legal position of this office. Suffice it to say our review of Ms. Lenmark's materials does not allay the State Auditor's concerns about SB 142.

Briefly, with respect to the Garrity Memorandum, we urge you and the members of the Committee to pay careful attention to the actual question presented to Mr. Garrity. Mr. Garrity was asked to address: "[is § 49-2-309, MCA] mandated by the provisions of Article II, Section 4, of the Montana Constitution . . . ?" Garrity Memo. at 1 (emphasis added). In other words, the question presented to him for research and analysis was whether the 1972 Montana Constitution required adoption of the specific provisions of the Montana Human Rights Act regarding insurance. *Id.*

Ultimately, Mr. Garrity concludes that he believes that the adoption of § 49-2-309, MCA was not mandated by the Montana Constitution. Garrity Memo. at 10. He further concludes that, in his opinion, the Montana Supreme Court likely would follow federal equal protection jurisprudence in interpreting Article II, section 4.

The question of whether § 49-2-309, MCA was mandated by the 1972 Montana Constitution is not dispositive to the question before the Committee concerning the potential repeal of the sex discrimination portion of the same. It also does not answer the question of whether passage of SB 142 and the imputed allowance for gender rating would, nonetheless, offend the Montana Constitution.

The Petesch Memorandum addresses two issues: "(1) whether enactment of [§ 49-2-309, MCA] was mandatory in light of Article II, section 4, of the Montana Constitution; and (2) whether repeal of this legislation would make the current practice of considering gender in insurance classifications unconstitutional." Petesch Memo at 1-2. As noted above, the first question, whether enactment of § 49-2-309, MCA was mandatory or not, is not relevant to the present bill which involves the repeal of that portion of the statute disallowing insurance rating based upon sex. We believe it is Mr. Petesch's second question that is salient to the present discussion. In answering that question, Mr. Petesch concludes:

> [I]t appears that if the Montana Supreme Court could be persuaded to follow the rationale regarding private discrimination . . . the use of gender as a classification could be held unconstitutional if [§ 49-2-309, MCA] was repealed.

Petesch Memo. at 12 (emphasis supplied). However, Mr. Petesch adds that "so long as the [Montana Supreme Court] applies traditional federal Equal Protection analysis to claims of alleged private discrimination, there would be no "state action," and the use of gender in setting insurance rates would be permissible if [the statute] were repealed." Id.

Both legal memos and Ms. Lenmark's testimony rely heavily upon one, early case, *In re the Will of Cram*, for the proposition that sex-based discrimination by private actors without state action is permissible under the Montana Constitution. 186 Mont. 37, 606 P.2d 145 (1980). *Cram* involved a private trust created for male members of certain organizations. The Supreme Court, applying solely federal equal protection analysis, concluded that there was no "state action" and therefore the trust was enforceable. 186 Mont. at 45, 606 P.2d at 150. *Cram*, however, stands as a solitary case, decided not under the Montana Constitution, but under federal constitutional analysis. Importantly, though it has not been overruled, in the twenty-nine years since it was decided, it has never been cited again by the Montana Supreme Court.

Rather than hinging our analysis on the estranged *Cram* decision, (which fails to even mention Article II, section 4 of the Montana Constitution), we believe that the fundamental issue presented by potential repeal of the prohibition in statute against gender-based insurance rating is precisely that practice's interplay with Article II, section 4, which provides that:

> [t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Montana Constitution, Article II, section 4. As Mr. Garrity notes in his memo, this provision is unique to Montana and is the only such provision in the country explicitly preventing discrimination by both public and private actors. Garrity Memo at 2; *see also* Clifford and Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L. Rev. 301 (Summer 2000).

In a range of decisions, most within the last ten years, the Montana Supreme Court has added both weight to the importance of the declaration of fundamental rights in Article II of the 1972 Montana Constitution and has repeatedly signaled, often with pointed language, that although it must recognize the minimum protections of the United States Constitution, it will not march "lock-step" with pronouncements from the United States Supreme Court. *State v. Matt*, 2008 MT 444, ¶ 33, 347 Mont. 530, ¶ 33, ___ P.3d ___, ¶ 33; *see also State v. Martinez*, 2003 MT 65, ¶ 51, 314 Mont. 434, ¶ 51, 67 P.3d 207, ¶ 51 ("[W]e are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than guaranteed by the United States Constitution.")

The willingness to read broader rights into the Montana Constitution than those conferred by the United States Constitution includes the Supreme Court's equal protection decisions. *See e.g. Cottril v. Cottrill Sodding Service*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987)("[Article II, section 4] provides even more individual protection than the . . . Fourteenth Amendment, Section 1 to the United States Constitution . . . .") *accord Bean v. State*, 2008 MT 67, ¶ 11, 342 Mont. 85, ¶ 11, 179 P.2d 524, ¶11 (citing *Farrier v. Teacher's Retirement Boar*d, 2005 MT 229, ¶ 14, 328 Mont. 375, ¶ 14, 120 P.3d 390, ¶ 14); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445 (finding that failure to provide insurance coverage for same-sex couples violated state constitutional equal protection guarantees).[1]

In several key decisions since the Garrity and Petesch Memoranda, the Montana Supreme Court also has concluded that sex discrimination in the insurance context raises serious constitutional concerns. *See Mountain States Tel. & Tel. Co. v. Comm'r of Labor & Indus.*, 187 Mont. 22, 608 P.2d 1047 (1979) (concluding that the exclusion of pregnancy-related disabilities constituted a sex-based distinction and therefore constituted discrimination on the basis of sex); *see also Banker's Life & Casualty Co. v. Peterson*, 263 Mont. 156, 866 P.2d 241 (1993) (differential treatment of men and women in policy was discriminatory on its face). The fundamental principles outlined in those cases later formed the basis for the recent attorney general opinion on the availability of contraceptive coverage. 51 Op. Atty Gen. Mont. No. 16.

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[1] Although *Snetsinger* was decided favorably for the plaintiffs on Article II, section 4 grounds, the plaintiffs also raised a constitutional challenge under Article II, section 3, which speaks of the fundamental right to pursue "life's basic necessities." They argued that the denial of access to health insurance constituted a denial of access to one of life's basic necessities. Although the decision in *Snetsinger* did not address their argument, it remains a potential theory for future litigants.

The office of the State Auditor is a constitutionally created office within the executive branch of government. Article VI, section 1. The State Auditor takes the same oath of office as do all executive, ministerial and judicial officers, which includes the language:

> I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States, and the Constitution of the State of Montana, and that I will discharge the duties of my office with fidelity (so help me God.)

Montana Constitution, Article III, section 3.

If, through passage of SB 142, the legislative branch were to remove the term "sex" from the § 49-2-309, MCA, (a statute crafted by the legislative branch of government), that action will not change the language of Article II, section 4 of the 1972 Constitution, which will continue to guard against "discrimination", based upon "sex", not only by state actors, but also by: "any person, firm, corporation, or institution." Nor would such a legislative act alter the oath of office taken by the State Auditor. Were SB 142 to pass, the State Auditor potentially will be faced with either approving of a practice of gender-based rating, thereby possibly violating Article II, section 4, or disapproving of the same.

While it is not the practice of this executive branch office to predict what another co-equal branch of government may or may not do, we do believe that gender-based rating in insurance likely violates the constitutional protections guaranteed by Article II, section 4 of the Montana Constitution, a provision which has been construed to provide more protections to the citizens of Montana than does the Fourteenth Amendment to the United States Constitution.

At the end of the day, Article II, section 4 of the Montana Constitution remains a singularly unique constitutional provision protecting the fundamental rights of Montana citizens and promising freedom from state and private discrimination, in all of its insidious forms. It is hard to fathom that its drafters imagined that this promise might be overborne by actuarial tables and the will of a particular legislature. The State Auditor continues to harbor serious constitutional concerns about this bill and we urge the Committee to give it a do not pass recommendation.

Should you require any additional information, or have any further questions or concerns, please do not hesitate to contact me at 444-5222 (direct).

Very truly yours,

John J. Mudd
Executive Counsel
State Auditor's Office

cc: Sen. Joe Balyeat, Chair
Members of the Senate Business, Labor and Economic Affairs Committee